IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.657 OF 2006

In

NOTICE OF MOTION NO.2831 OF 2006

In

SUIT (LODGING) N0.2365 OF 2006

Mr.Jonathan Brady
having his permanent address at NG4,
Xavier Apartments, Opp. D Block,
Sarawati Vihar,
Pitampura, Delhi 110 034. : Appellant
(Orig.Defendant)

V/s.

Entertainment Network India Ltd.
a company incorporated under the
Companies Act, 1956 having its
registered office and carrying on
business inter alia, 4th Floor,
‘A’ Wing, Matulya Center,
Senapati Bapat Marg,
Lower Parel (West), Mumbai-400 013. : Respondent
(Orig.Plaintiff)

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Mr.Janak Dwarkadas, senior counsel, with Mr.Vivek Kathpalia and Mr.Vyapak Desai i/b. M/s.Nishith Desai & Associates for the appellant.

Mr.Ravi Kadam, Advocate General, with Mr.A.S.Kamat i/b. M/s.Mulla & Mulla & Cragie Blunt & Caroe for the respondent.

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CORAM : R.M.LODHA & S.A.BOBDE,JJ.

Date of Reserving) : 26.9.2006
the judgement.)

Date of Pronouncing): 29.9.2006
the judgement.)

JUDGEMENT (Per S.A.Bobde,J.)

1. This is a defendant's appeal against the ad-interim order of the single Judge restraining him from taking up any employment in business similar to or competing with the plaintiff till 31.3.2007 and using or disclosing any confidential information and trade secret relating to the plaintiff's business. On the injunction operating, the respondent-plaintiff has undertaken to pay the appellant's salary and give him other benefits in accordance with the employment agreement, whether he works or not.

2. The appellant was employed as a Radio Jockey by the plaintiff (respondent herein) in their radio programme under an agreement dated 1.12.2003. The employment agreement described as the "Talent Agreement" was for a period of 16 months upto midnight of 31.3.2005. The

agreement was renewable at the end of this period on such revised terms and for such periods as may be mutually agreed to by the parties.

3. The agreement provided that the appellant shall exclusively serve the respondent and shall not offer any of the services for which he was employed, to any other employer during the currency of the agreement. It also provides that anything that is prepared or created in pursuance of the Artiste’s (appellant) association with the respondent shall vest in the respondent which shall ensure that the intellectual rights of the respondent are always protected. A specific clause provides that the appellant agrees and acknowledges that the breach of any of the obligations relating to exclusivity and confidentiality will result in significant loss and damage to the business of the respondent and that he will, therefore, be liable to pay liquidated damages estimated at the sole discretion of the respondent.

4. The relevant clauses of the Talent Agreement are reproduced below:-

"2. Obligations of the Artiste:

a. The Artiste unconditionally and

irrevocably assures and consents to ENIL, that during the continuance of this Agreement he shall not contract directly or indirectly provide any of the services enumerated in this Agreement with any other Company/Firm/ Organisation conducting business which is similar to ENIL's business. The Artiste understands and accepts that exclusivity is an intergral (sic) part of this Agreement.

j. The Artiste shall not undertake any work, of any nature whatsoever that is directly or indirectly in conflict/competition with and/or detrimental to the interests of ENIL, as well as in conflict with the said programme(s) or affecting his commitments hereunder, during the validity of this Agreement, without the prior written consent of ENIL.

l. The Artiste unconditionally agrees and undertakes that he shall not perform or offer his services to any of ENIL's competitors during the currency of this Agreement. The Artiste will also ensure

that prior written sanction of the Programming Supervisor and the Station Head of ENIL is obtained before the Artiste offers his services to any person or institution. The Artiste will also ensure that there is no conflict of interest for ENIL and will also conduct himself appropriately so as to protect the interests and brand name of ENIL/Radio Mirchi.

n. The Artiste acknowledges, consent and undertakes that all documents, matter, material, things etc. prepared and created in pursuance of the Artiste's association with ENIL including but not limited to content created for hosting of various programs, software(s) developed, copyright in documents, creative etc. and any/all associated and related Intellectual Property Rights (IPR's) will always and at all times unconditionally and irrevocably vest only in ENIL. ENIL will always remain the absolute owner of the IPR's, it being understood that the consideration paid by ENIL to the Artiste

includes the acquisition of the IPR's and related/associated rights in the documents, matter, material, things etc. The Artiste will at no time disclose or divulge the same either in part or in full for any purpose; and will ensure that the IPR's of ENIL is always protected."

5. There is not much dispute about the meaning and effect of the clauses in question, particularly the exclusivity and non-compete clauses. The dispute seems to be regarding the currency of the agreement which was intended, in terms to last upto the midnight of 31.3.2005. According to the appellant, the agreement expired on the specified date and, in any event, on 31.3.2006. His case, therefore, is that he cannot be bound by the non-compete clauses intended to operate during the currency of the agreement. According to the respondent, the appellant was re-employed under letter dated 13.2.2006 for a further period of one year from 1.4.2006 for a salary Rs.1,40,000/- per month.

6. After the Talent Agreement dated 1.12.2003 and before the expiry of one year thereafter, the respondent wrote a letter dated 13.2.2006, referred to above, re-employing

the appellant for a further period of one year on a salary of Rs.1,40,000/- per month. That letter is reproduced herein in full:-

> "This has reference to your contract ending 31st March 2006. We are happy to extend you services in our organization for a further period of one year. Your contract will consequently end on 31st March 2007.
>
> You will be paid an all inclusive consideration of Rs.1,40,000/- per month (Rupees One Lakh Fourty Thousand per month only) towards your services, subject to deduction of such taxes as may be applicable.
>
> All other terms and conditions mentioned in your offer letter remain unchanged.
>
> Please confirm your acceptance of our offer by signing a copy of this letter and returning to us within three days of receipt of this letter."

Though the letter refers to an offer made by the appellant remaining unchanged, the respondent has not

been able to point out any offer made by the appellant. The letter also called upon the appellant to confirm his acceptance of the respondent's offer by signing a copy of the letter and returning to them within three days of the receipt of the letter. There is a denial by the appellant for having received this letter. In fact, by a letter written on 31.7.2006, the respondent wrote to the appellant to acknowledge the letter dated 13.2.2006 along with another letter. Thus, prima facie, we are of view that there is no agreement mutually assented to by both the parties governing the appellant's employment after 31.3.2005.

7. It appears that after the expiry of the agreement on 31.3.2005, the appellant worked for the respondent under some arrangement, the terms and conditions of which have not been reduced to writing or agreed upon mutually by both the sides. The respondent has produced a letter dated 22.6.2005 revising the appellant's salary from Rs.75,000/- to Rs.90,000/- per month. That letter states that other terms and conditions remain unchanged. This letter is unilateral. Be that as it may, the controversy in the appeal does not relate to the period of employment upto 31.03.2006. The dispute is for the period thereafter and, therefore, the letter of the respondent dated 13.2.2006 assumes importance. By the said letter,

the appellant's salary was increased to Rs.1,40,000/-. On 20.5.2006 it appears that the appellant resigned with effect from the end of the month. Even so, it seems that he worked thereafter. On 31.7.2006 the respondent, as stated earlier, called upon the appellant to acknowledge the earlier letter dated 13.2.2006 purporting to extend his services unilaterally from 31.3.2006 and seeking the appellant's confirmation of the acceptance of such unilateral extension. The respondent has not placed on record any material whatsoever which may show that the appellant assented to the extension of employment upto 31.03.2007 on the terms and conditions incorporated in the Talent Agreement dated 1.12.2003. Rather it would be seen from the two e-mails dated 4.7.2006 and 5.7.2006 exchanged between the parties and the draft of the Talent Agreement dated 1.7.2006 sent by the respondent to the appellant that the appellant continued to work with the respondent after 31.3.2006 by way of some ad hoc arrangement. As a matter of fact, neither the plaint nor the affidavit-in-support of the Notice of Motion mentions about the afore-referred two e-mails and the draft Talent Agreement dated 1.7.2006. If there was already an agreement by the appellant to remain in employment of the respondent upto 31.3.2007, pursuant to the letter dated 13.2.2006 on the terms and conditions set out in the agreement dated 1.12.2003, where was the occasion for the

respondent to draft the Talent Agreement dated 1.7.2006 to be effective from that date and send it to the appellant. However, after the letter dated 31.7.2006 he sent a S.M.S. on 1.8.2006 to the respondent that he would not be able to work for them.

8. The respondent filed the present suit on 19.8.2006 and applied for an ad-interim injunction. The appellant apparently agreed to the hearing on the application without filing an affidavit-in-reply by filing the copies of two e-mail on 4.7.2006 and 5.7.2006. The learned single Judge granted an ad-interim order. The appellant filed the present appeal before us on 1.9.2006. We granted a stay to the injunction. Thereafter, the respondent preferred Special Leave Petition before the Supreme Court, being Petition for Special Leave to Appeal (Civil) No.15199/2006. The Supreme Court has requested this Court to dispose of the said appeal. Hence, the appeal was taken up for final hearing.

9. Mr.Dwarkadas, the learned counsel for the appellant, submitted that the prima facie observations of the learned single Judge that the agreement has been acted upon and accepted by the appellant by the conduct of receiving the letter dated 13.2.2006 is not correct. We are inclined to accept this submission in view of our

observations earlier that there is only one agreement brought on record and that is the Talent Agreement dated 1.12.2003, the duration of which was for a period of 16 months. After this, there is no agreement of which specific terms and conditions can be read. It appears that the appellant worked for a period of one year after the expiry of the Talent Agreement of 31.3.2005. Before that, the respondent wrote a letter dated 13.2.2006. However, that letter which contained an offer of employment contemplated a conclusion of the terms of the agreement by acceptance of that letter and its return by the appellant. This is nowhere shown to have been done. Though the letter of 13.2.2006 refers to an offer made by the appellant, no offer made by the appellant in respect of the terms and conditions is brought on record. In fact, as late as 31.7.2006, the respondent has written for acknowledgement by the appellant of the letter dated 13.2.2006. We are, therefore, prima facie clearly of view that even though the respondent was employed after 31.3.2005, he was not employed under the Talent Agreement dated 1.12.2003 and the terms and conditions thereof. The employment was ad hoc on unstated terms and conditions on a salary fixed by the respondent.

10. There is no doubt that the appellant eventually worked voluntarily upto 1.8.2006. But merely because it

was voluntary, it cannot be said that it was on the terms and conditions specified in the Talent Agreement dated 1.12.2003 which was designed to be enforced till 31.3.2005. The existence of a specific agreement mutually agreed upon by both the parties assumes great importance because what is being set up by the respondent against the appellant is a non-compete clause which by its very nature must be shown to have been expressly agreed to beyond the duration for which it was originally agreed to. That is not the case here. Such an express agreement is necessary in view of clauses 8 and 13 of the Talent Agreement which read as under:-

> "8. Amendment:
>
> Nothing contained herein shall be amended by the parties thereto except by mutual agreement on writing.
>
> 13. Entire Agreement:
>
> This Agreement represents the entire agreement between the parties hereto in the subject matter thereof and supersedes and cancels all prior agreements, arrangements or understandings, whether written or oral,

between the parties hereto. This Agreement may be assigned by ENIL to any other party/entity, group company, division etc. without referring to any other person or party. No part of this document may be amended without the prior written concurrence of both parties hereto."

11. We have no doubt that the extension of the Talent Agreement dated 1.12.2003 constitutes an amendment to the agreement which requires the mutual agreement of both the parties in writing as contemplated by clause 8.

12. The learned counsel for the appellant relied on the decision of the Supreme Court in Percept D'Mark (India) (P) Ltd. v. Zaheer Khan [(2006) 4 SCC 227]. In that case, the Supreme Court held, while refusing an injunction enforcing a negative covenant, that while construing the provisions of section 27 of the Contract Act, neither the test or reasonableness nor the principle of restraint being partial is applicable, unless it falls within the express exception engrafted in section 27. In that case, the Supreme Court upheld an order of the Division Bench of this Court reported in AIR 2004 Bom. 362 to which one of us (R.M.Lodha,J.) was a party that the restrictive clause was valid and enforceable during

the term of the agreement and not thereafter. This Court had held that a negative covenant which survived the expiry of the agreement was impermissible as such a clause which is sought to be enforced after the term of the contract is prima facie void under section 27 of the Contract Act. Their Lordships further observed as follows:-

> "64. Assuming without admitting that the negative covenant in clause 31(b) is not void and is enforceable, it was nevertheless inappropriate, if not impermissible, for the Single Judge to grant an injunction to enforce it at the interim stage, for the following reasons:
>
> (i) Firstly, grant of this injunction resulted in compelling specific performance of a contract of personal, confidential and fiduciary service, which is barred by clauses (b) and (d) of Section 14(1) of the Specific Relief Act, 1963.
>
> (ii) Secondly, it is not only barred by clause (a) of Section 14(1) of the Specific Relief Act, but this Court has

consistently held that there shall be no specific performance of contracts for personal services.

(iii) Thirdly, this amounted to granting the whole or entire relief which may be claimed at the conclusion of trial, which is impermissible (Bank of Maharashtra v. Race Shipping & Transport Co. (P) Ltd. (SCC paras 10-12).

(iv) Fourthly, the Single Judge's order completely overlooked the principles of balance of convenience and irreparable injury. Whereas Percept (the appellant) could be fully compensated in monetary terms if they finally succeeded at the trial, Respondent 1 could never be compensated for being forced to enter into a contract with a party he did not desire to deal with, if the trial results in rejection of Percept's claim. (Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan).

(v) The principles which govern

injunctive reliefs in such cases of contracts of a personal or fiduciary nature, such as management and agency contracts for sportsmen or performing artistes, are excellently summarised in a judgment of the Chancery Division in Page One Records Ltd. v. Britton. In this case it was held that, although the appellant had established a prima facie case of breach of contract entitling them to damages, it did not follow that entire of them were entitled to the injunction sought; that the totality of the obligations between the parties gave rise to the fiduciary relationship and the injunction would not be granted, first, because the performance of the duties imposed on the appellant could not be enforced at the instance of the defendants and, second, because enforcements of the negative covenants would be tantamount to ordering specific performance of this contract of personal services by the appellant on pain of the group remaining idle and it would be wrong to put pressure on the defendants to continue to employ in

> the fiduciary capacity of a manager and agent someone in whom he had lost confidence."

13. We are of view that the learned single Judge erred in holding prima facie case in favour of the plaintiff for the reasons that we have indicated above.

14. Even if we assume that the plaintiff has been able to make out prima facie case, we find it difficult to uphold the ad-interim order granting the injunction since the question of balance of convenience and irreparable injury has not at all been considered by the learned single Judge. The legal position exposited by the Supreme Court in the case of the Percept (cited supra), particularly clauses (iii), (iv) and (v) has been totally ignored and overlooked by the learned single Judge resulting in a legally infirm order. Ought we know, had the learned single Judge considered the aspects of balance of convenience and irreparable loss in the light of afore-referred legal position, he would have exercised any discretion in favour of the plaintiff and granted any ad-interim injunction. In our view, to require an able bodied and talented person to remain idle certainly tilts the balance of convenience against the grant of an injunction and might even be opposed to public policy.

As regards the question of irreparable loss, it is clear that such loss would not visit the respondent since clause 5(d) of the Talent Agreement which expired on 31.3.2005 contemplated with reference to the obligations of the artiste regarding exclusivity of service and non-competition as follows:-

> "d. The Artiste hereby agrees and acknowledges that any failure to comply with the obligations set out in the aforesaid Clauses will result in significant loss and damage to the business of ENIL. In case the above obligations are not complied with, the Artiste will be liable to pay to ENIL liquidated damages, which ENIL at its sole discretion will estimate, this is without prejudice to any further legal action that ENIL may decide to take against the Artiste."

15. The learned counsel for the respondent submitted that this Court should be slow to interfere with the ad-interim order of injunction since it is an interlocutory order. We, however, find it necessary to do so since this is an appeal on principle and the interlocutory order is contrary to a well-settled

position in law considered by the Supreme Court in Percept D'Mark's case. It was also argued on behalf of the respondent that the injunction is necessary to protect the interest of the employer and that the matter involves public interest. As far as this argument is concerned, we do not find that proprietary or commercial interest of the respondent will be jeopardised if the injunction is withheld.

16. The learned counsel for the appellant submitted that though the terms of the agreement dated 01.12.2003 are not applicable beyond the time specified therein, yet the appellant has no objection to the injunction in terms of prayer clause (b) which restrains him from using or disclosing or divulging the confidential information and trade secret and knowledge relating to the respondent's business plans, strategies, trade secrets, formats strategy, etc., being continued. We accept the statement of the learned counsel for the appellant and that in our view would adequately protect the interest of the employer.

17. We do not see how any element of public interest is involved as canvassed by the learned counsel for the respondent. The question of public policy would arise on the non-compete exclusivity clause being challenged as

contrary thereto. But that is not the case here. The learned counsel for the respondent relied on several cases referred to in the notes of argument submitted by him, but we do not consider it necessary to deal with each one of them since the principles involved in those cases were adequately considered by the Supreme Court in Percept D'Mark's case (supra) and we have applied the legal position crystalised therein.

18. Conscious of the fact that the appellant had not filed an affidavit-in-reply before the learned single Judge, we have recorded prima facie observations on the basis of the material that was placed for consideration before the learned Motion Judge at the time of consideration of ad-interim relief. The Notice of Motion is still pending and would be decided independently on merits, after considering all relevant aspects of the matter which may emerge after all the affidavits are filed.

19. For the reasons stated above, we are of view that the appeal deserves to be allowed and is hereby allowed.

Sd/-

R.M. LODHA, J.

Sd/-

S.A. BOBDE, J.